Supreme Court of the United States

October term, 1953

No. 32

UNITED STATES OF AMERICA, APPELLANT

vs.

ROBERT M. HARRISS, RALPH W. MOORE, TOM LINDER, COMMISSIONER OF AGRICULTURE OF GEORGIA, AND NATIONAL FARM COMMITTEE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief for Appellee, Tom Linder, Commissioner of Agriculture of the State of Georgia

Hugh Howell, Connally Bldg., Atlanta, Ga.
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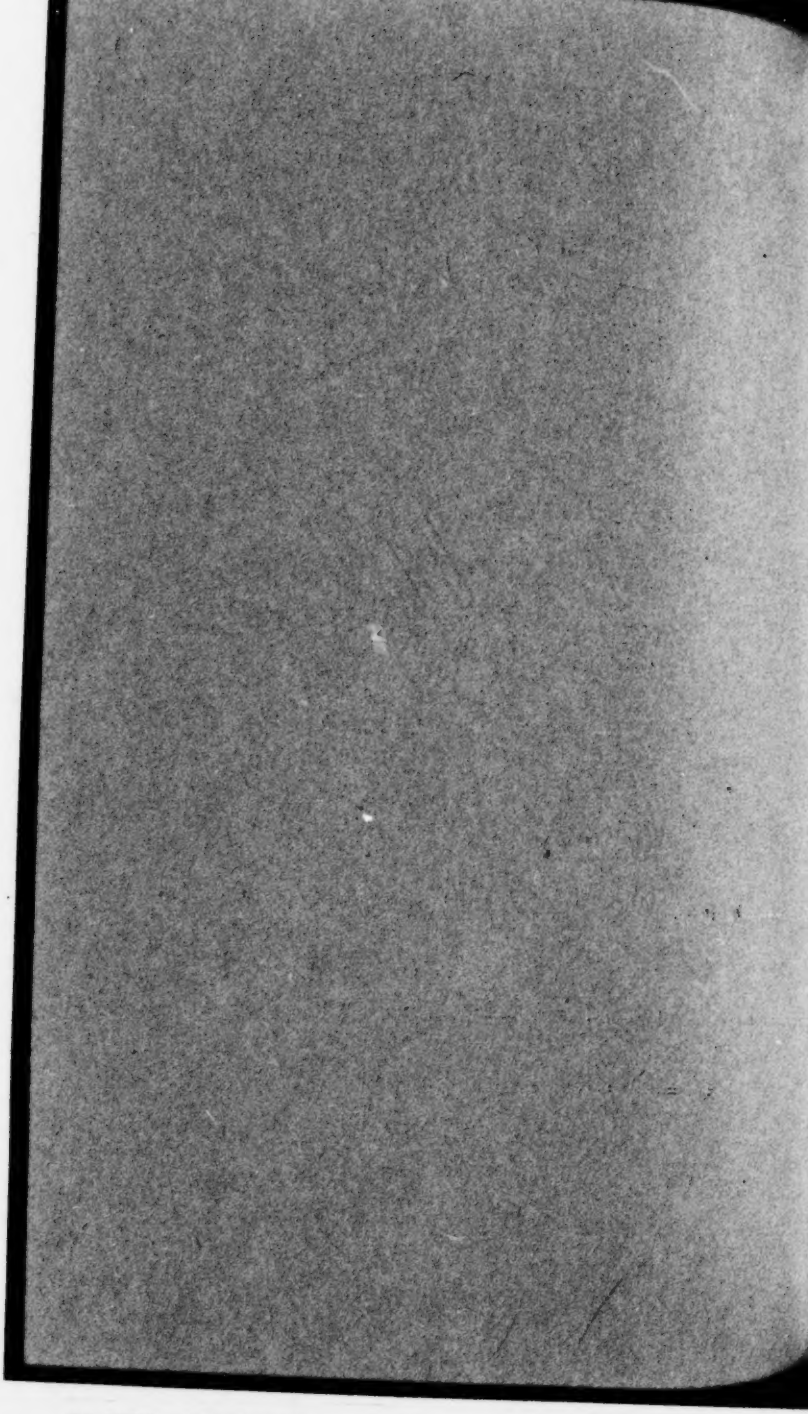

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Tom Linder, Commissioner of Agriculture of Georgia, since January 1, 1941, is charged in Count 9 of the Information with violation of Section 308 of the Regulation of Lobbying Act.

District Court Judge Holtzoff held that this section was unconstitutional by reason of the fact that the penalty clause, Section 310 is unconstitutional.

The Penalty Denies Freedom of Speech in Violation of the First Amendment.

The court below was unquestionably right in holding that sub-paragraph (b) of the penalty was in violation of the First Amendment to the Federal Constitution:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Sub-paragraph (b) of the penalty reads as follows:

"(b) In addition to the penalties provided for in (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000.00 or imprisonment for not more than five years, or by both such fine and imprisonment."

This is the first time in the history of Congress, insofar as we have been able to find, where that lawmaking body has attempted to punish a criminal offense by abridging the offender's freedom of speech. If it has such power to make such a mandatory penalty for even the smallest technical violation of this law, even where the defendant had never heard of the law before, what is there to prevent it from amending that act and taking this right away for life.

As was said in the case of National Assn. of Mfrs. v. McGrath, 103, F. Supp. 510.

2. . . . A person convicted of a crime may not for that reason be stripped of his constitutional privileges. In principle this provision no different than would be an enactment depriving a person the right of counsel, or the right of trial by jury, for a period of three years. It is inconceivable that anyone would argue in support of the validity of such a provision, and, yet, in principle the penalty clause in this statute is no different . . ."

It is only in extreme cases that a lawmaking body has the right even to regulate or restrict freedom of speech, and the other rights guaranteed by the First Amendment. Mr. Justice Rutledge speaking for the court in Thomas v. Collins, 323 U. S. 516, 530-531, in a case involving the rights guaranteed by this amendment, expresses the rule most forcibly:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance . . ."

The court on pages 539-540 further holds:

"As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly . . . We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

In Thornbill v. Alabama 310 U. S. 88, 101-102 (Mr. Justice

Murphy) we find:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern **without previous restraint or fear of subsequent punishment.** The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress in its letter sent to the inhabitants of Quebec (October 26, 1774) referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive **officers are shamed or intimidated, into more honourable and just modes of conducting affairs.**" Journal of the Continental Congress, 1904, Ed., Vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation. **must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.**" (Emphasis added.)

We quote from the opinion of Mr. Justice Roberts in Herndon v. Lowry 301 U. S. 242, 258:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violate the principle of the Constitution."

Hague v. C. I. O. 307 U. S. 496, 513 (Mr. Justice Roberts)

> **"Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and op-**

portunities to accrue to citizens therefrom." (Emphasis added.)

Still again in Bridges v. California, 314 U. S. 252, 263 (Mr. Justice Black), the court states the rule:

"For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press. It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow'."

Mr. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U. S. 357, 377 is often quoted:

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches, and burnt women. It is the function of speech to free men from the bondage of irrational fears. **To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."** (Emphasis added.)

The rule **As Applied to the Courts** is well established that where publications criticise the actions of the courts, the First Amendment forbids the punishment by contempt for comment on pending cases in absence of a showing that the utterances created a "clear and present danger to the administration of justice." See Craig v. Harney 331 U. S. 367, 372. (Mr. Justice Douglas). We take the following excerpts from page 372 of the opinion:

". . . The fires which the utterance kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil".

Similar to Edicts Behind the Iron Curtain

In providing this punishment, Congress apparently fears that the utterances, of a man convicted of a criminal offense, bearing the "attainted" stigma attendant thereto, petitioning congress for relief from the denial of his freedom of speech, or any other grievances inflicted or about to be inflicted upon him in pending bills, would constitute **"a grave and impending danger".** Hence, the penalty forbids him "from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation . . ." He is thus even denied the right to employ counsel to appear before congress in his behalf. Although Commissioner of Agriculture of Georgia, and required by the laws of Georgia to do the very things he is accused of doing by the information, if convicted, he is forbidden for three years to perform his duties which he owes the State of Georgia as an official by appearing before committees of congress and petitioning congress for redress of the grievances of the farmers of Georgia. Although Editor of the Market Bulletin, the official publication provided by the State of Georgia for his use as Commissioner, he is forbidden to use it in urging congress to enact bills favorable to the farmers of Georgia or to defeat bills injurious to the farmers of Georgia. Although he is an attorney at law, he would be denied the right to appear before committees of congress for relief for his clients. Should he be elected to the United States Senate, an office to which he is known to aspire, the penalty forbids him to attempt "directly or indirectly to influence the passage of any proposed legislation", even though it be his own bills. **No one convicted of the minutest violation of the act is excepted.**

The Penalty provided is a Bill of Attainder, and a Cruel and Unusual Punishment.

Paragraph 3 of Section 9, Article 1 of the Constitution of the United States forbids the passage by Congress of Bills of Attainder, and the 8th Amendment forbids cruel and unusual punishments.

Although not shown by the record, and no defense in this case, Mr. Linder had really never heard of this law until he was indicted in 1948, for its violation. If convicted, he will have become **attainted,** for doing the very acts which he had

been doing for years, and, for which, had he known of the law, he would have thought he was exempted from its provisions by reason of his being Commissioner of Agriculture of Georgia.

The case at bar is in many ways similar to that of Weems v. United States, 217 U. S. 349. This case had two penalties for the same offense one of which the court held was a cruel and unusual punishment and reversed the lower court because of it.

The Two Penalties Provided in Section 310 Are Not Severable.

The rule as to severability as applied to a criminal statute is laid down in 59 C. J. 677, Sec. 222:

> ". . . that where a part of the cumulative punishment provided for is invalid, and cannot be imposed, the invalidity carries with it the entire statute"

Citing State v. Gravolet 168 La. 648, 123 Sou. 111.

It will be observed that the general scheme of the entire act is to restrict the exercise of the rights guaranteed under the First Amendment. This general scheme is carried to and emphasized in the penalty. We quote from 59 C. J. 644 (Statutes)

> "The whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning and purpose as to preclude the presumption that the legislature would have passed the one without the other . . ."

Citing, besides other cases, Poindexter v. Greenhow 114 U. S. 270, from which we quote from page 306:

"It is undoubtedly true that there may be cases where one part of the statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional: but these are cases where the parts are so distinctly separable, that each can stand alone, and where the court if able to see and declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature

one they may have never been willing by itself to enact . . ." To the same effect, see Dorchy v. Kansas 264, U. S. 286, 290.

The Weems case, supra, is a leading authority on the separability of penalties and we quote therefrom, pages 281, 282:

"It is suggested that the provision for imprisonment in the Philippine Code is separable from the accessory punishment, and that the latter may be declared illegal, leaving the former to have application . . . This proposition is not applicable to the case at bar. The imprisonment and the accessories were in accordance with the law. They were not in excess of it, but were positively required by it . . . In re Graham 138 U. S. 461, it was recognized to be 'the general rule that a judgment rendered by a court in a criminal case, must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of the punishment inflicted, renders the judgment absolutely void'. In ex parte Karstendick, 93 U. S. 396, 399, it was said: 'In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence.' " . . .

" . . . The Philippine Code unites the penalties of **cadena temporal,** principal and accessory, and it is not in our power to separate them, even if they are separable, unless their union was not made imperative by the legislature . . ."

Unconstitutionality of Part Destroys Presumption of Constitutionality of Remainder of Act

We recognize the general principle that all laws are presumed to be constitutional. However, there is another rule which in this case completely destroys this presumption, as to the act in question, which rule we quote from 16 C.J.S. 276:

> "It is the rule that when a part of a statute has been declared unconstitutional, the presumption in favor of constitutionality will not be indulged in as to the remaining portion".

We, therefore urge that as to the act as a whole, and each separate section, when it clearly appears that one of the penalties provided is unconstitutional, there is no longer any presumption that any portion is constitutional. To put it

mildly, there are several portions of the act which are of doubtful constitutionality, but the general presumption of constitutionality of laws might tip the scales in their favor in some cases. However, when stripped of this protective presumption, their unconstitutionality is clearly apparent.

Section 308 Is Unconstitutional

Because It Is Vague and Indefinite

Although the court below did not specifically hold the Section 308 was unconstitutionally vague and indefinite, yet, perforce of necessity, this section is dependent on Section 307 to specify the persons to whom Section 308 applies. And, when Section 307 recites: "The provisions of this title shall apply to any person, . . . the principal purpose of which person is to aid" in the passage or defeat of legislation, then Sections 307 and 308 must be construed together. If the term "principal purpose" is vague and indefinite when construed with Section 305, and renders that section unconstitutional, then, in like manner, it is obliged to render Section 308 unconstitutional, for no one can violate Section 308 unless his principal purpose is to aid in the passage or defeat of such legislation or to influence such passage or defeat.

When considered alone, Section 308 is a vague and indefinite and furnishes no ascribable standard of guilt whereby a person can determine what acts are punishable. It forbids "doing anything in furtherance of such objects" until the person registers. This term is so all embracing that it covers every conceivable act, word, or even thought of a person charged with the violation of this law, regardless of whether such action, word or thought is protected by the First Amendment to the Constitution or some other portion of the Constitution.

Again, Section 308 provides that it shall not apply to "any public official acting in his official capacity". Defendant Linder thought that when he was performing the duties which the laws of Georgia require of its Commissioner of Agriculture, and doing the same things that he had been doing for years, he was acting in his official capacity. Public officers, generally, would think that when they were performing duties required by law they would be exempt from this law. The Government thinks different. If the Government is right in its thinking, then the act is a trap for the unwary.

There is, thus, no ascribable standard by which it can be determined what is meant by "principal purpose". Neither is there any ascribable standard of guilt whereby a person can determine what acts are punishable as included in "doing any thing in furtherance of such object", nor is there provided a standard whereby it can be determined when such act is "in furtherance of such object". Still, again, there is no standard provided whereby it can be determined when a person is exempt under the exemption "any public official acting in his official capacity, and when he is not acting in his official capacity. A jury, trying this case, would be called upon to determine what the "principal purpose" of defendant was; whether the acts with which he is charged are punishable; and whether defendant was a "public official acting in his official capacity". With no ascribable standards provided by the law to guide them, the only standard which they could use to determine these matters would be their **enlightened consciences.** As men of common intelligence they would have to guess at the meaning.

In Winters v. New York 333 U. S. 507, this Court held invalid a state statute which hinged upon the meaning of the word "principal". the statute penalized the circulation of matter "principally" made up of criminal news, etc. This Court held that the standard of certainty in statutes punishing offenses is higher than in civil statutes and that men of common intelligence cannot be required to guess at the meaning of a penal enactment.

In Connolly v. General Construction Co. 269 U. S. 385, 399, this Court condemned a statute so vague "that men of common intelligence must guess at its meaning".

The Winters case also held that the vagueness of an act may be "from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt".

This Court has also held that: "laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. . . . Before a man can be punished, his case must be plainly and unmistakably within the statute." U. S. v. Brewer 139 U. S. 278, 288. Other cases in point are U. S. v. L. Cohen Groc. Co. 255 U. S. 81 and Weeds v. U. S. 255 U. S. 109.

Ex Parte Jackson 45 Ark. 158 held that a criminal statute making it a misdemeanor to "commit any act injurious to the public health or public morals or the perversion or obstruction of public justice or the due administration of the law is void for uncertainty".

L. & N. Railroad v. Commonwealth 99 Ky. 132 is another case in point where the statute forbade a railway corporation "to charge, collect or receive more than a just or reasonable rate of toll for the transportation of passengers", and it was held too vague and indefinite.

We submit that section 308 is unconstitutional for the same reasons that the District Court in the case of National Association of Manufacturers of the United States v. J. Howard McGrath held that sections 303 to 307 inclusive were unconstitutional, and for the additional reason that it violates the First Amendment to the Constitution of the United States, by denying freedom of speech, freedom of press, and the right to petition congress for a redress of grievances. The authorities cited relative to Paragraph (b) of Section 310 apply with equal force as to the constitutionality of section 308.

Justice Requires the Dismissal of the Charge Against Mr. Linder, Whether the Act be Held Constitutional or Unconstitutional.

Although the court below limited its decision to the questions of whether the act was constitutional, and the separability of the penalties, and these are the only questions before this court, yet, should this Court regard the matter differently from the court below and hold the law constitutional, and the penalties separable, we respectfully urge this Court to examine most carefully the record as to the charges against Mr. Linder, and if our contentions are found correct, to affirm the dismissal by the court below as to him for the reasons hereinafter set forth.

Mr. Justice Brandeis, in the opinion in Dorchy v. Kansas, 264 U. S. 286, 289 says:

> ". . . This court has power not only to correct errors, in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may require . . ."

The record shows that Mr. Linder should never have been prosecuted because the act exempts those acting in an official capacity.

The allegations of the government incorporated in Count IX show that Mr. Linder was the Commissioner of Agriculture of Georgia and was actually performing the duties required of its Commissioner by the Code of Georgia, (a portion of which statutes are set forth in his motion to dismiss), and that the very acts for which he is being prosecuted are those which the Code of Georgia require him to do.

The government admits in paragraph 6 of count 1, (R p 3) incorporated in Count 9 that Linder was apparently acting in his official capacity:

". . . as to the defendants Tom Linder and James E. McDonald, that the member of Congress would be unaware that they were acting outside and apart from their capacities as state officials instead of making unbiased efforts to further the interests of persons engaged in agricultural pursuits and of other members of the public."

The following are the acts he is alleged to have done:

1. Testified before Committees of Congress.
2. Sent letters and telegrams to members of Congress.
3. Issued press releases which were distributed to Congress by Sou. Com. and Farm Com. Council.
4. Made speeches at functions of these organizations.
5. Organized the Farm Commissioner Council for the purpose of utilizing it in influencing legislation relative to farm commodities.
6. Made a statement before the Senate Committee on Agriculture using material prepared by Dr. Clair opposing legislation tending to reduce prices of farm commodities.
7. Made a speech urging Congress to enact legislation ending OPA.

Georgia Code Section 5-111 requires the Commissioner of Agriculture to

"Correspond with all bureaus, societies, corporations and organizations having for their purposes the development of the Southern States" . . .

Under Chapter 5-2 of the Code of Georgia, a bureau of Markets was within the Department of Agriculture, the Director to be appointed by the Commissioner, and to work in cooperation with the Commissioner, one of which purposes as set forth in Code Section 5-201 to assist producers in selling their products at fair and reasonable prices.

Georgia Code Section 5-204 provides that among other duties to be performed in cooperation with the Commissioner is the investigation of methods and practices in connection with the production and sale of all agricultural products and all matter relevant thereto, and to disseminate information in such form as he shall deem advisable relating to these matters in all their phases.

Paragraph (e) of this section requires him to "Secure the cooperation of any other organization that may be of assistance therein. Paragraph (f) requires him to "Assist and advise in the organization and conduct of cooperative and other associations in connection with such and all matters relevant thereto.

Under Paragraph (i) he is authorized to take such other measures as shall be proper for carrying out the purposes of the Chapter.

Measured by the foregoing laws of Georgia, each of the 7 acts which he is charged with doing is required or authorized by the laws of Georgia for him to perform.

If these seven acts set forth are all duties of his office and he performed these acts, then he is exempt.

The case of Isbrandsten-Moller Co. vs. U. S. 300 U. S. 139, 145, 81 L.E. 562, is conclusive that the facts alleged are sufficient to show that defendant acted in his official capacity.

This was an action for injunction against the enforcement of an order and the District Court of three judges dismissed and the bill for failure to state facts sufficient to constitute a cause of action. On appeal to the United States Supreme Court, the court ruled as follows:

"Despite its recitals of legitimate purpose, the order, so the complaint alleges, sprang from illegal motives, namely, to regulate and stabilize freight rates for the benefit of carriers belonging to steamship conference, to compel appellant to join a conference, and to create a monopoly in transoceanic shipping.

"Aside from the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it, the allegations of the complaint are mere conclusions unsupported by any facts pleaded and are, therefore, insufficient."

Other cases in point are:

In U. S. vs. Reardon, et.c. Co. 191 Fed. 454, held that to charge that an act is illegal is insufficient and something more must be alleged which the court can see on the face of the indictment is illegal if the facts are proved.

The case of U. S. v. Van Leuven 62 F. 62, 66 defines "Official Capacity" as being the capacity in which a person acts because he lawfully performs duties that are of an official character. This case also holds that in order to act in an official capacity, it is not even necessary to be an officer.

67 C.J.S. page 486 defines an official act as follows:

"Any act done by an officer in his official capacity, **under color** and by virtue of his office; an act done under some authority derived from the law or in pursuance of prescribed duties. The term does not have reference merely to the lawful acts of the officer holding the office, but includes all acts done under color and by virtue of the office."

Citing among numerous cases Tinkoff v. Campbell, D.C. Ill., 86 F. Supp. 331, 332.

In addition to the presumption of innocence, there is the presumption that where an officer is charged with the duty of performing certain acts and he performs these official acts, it is presumed that he discharges his duty and performs them as required by law. Anniston Mfg. Co. v. Davis 301 U. S. 337; 81 L. E. 1143; 57 S.CT. 816.

Officer Cannot Deny That He Acted in His Official Capacity

In People v. Suarez 25 Puerto Rico 198, it was held that so strong is the presumption that where a duty is imposed on an officer and he apparently acts as such public officer, he cannot avoid the applicability of a statute relative to public officers by claiming he acted as a private citizen. He will not even be heard to deny that he was acting in an official capacity.

These allegations in the Information demand the irrebuttable presumption of law that he was acting in his official capacity.

This case in analogous to that of Carrington v. United States 208 U. S. 4, 52 L. E. 367, 368, which involved the same statute as the Weems case, supra, and involved the indictment of defendant as a **civil officer** when he was serving as a military officer.

From this we quote:

"At this time the plaintiff in error was an officer of the Army on the active list, detached to command a batallion of Philippine scouts, admitted to be a part of the military establishment of the United States . . . what happened was that he received $3500.00 from civil sources, to be used by him in connection with his military command, in the performance of duties incident to that command . . ."

The court held further:—

". . . the plaintiff in error was performing no public function of the civil government of the Philippines; he was performing military functions to which the civil government contributed a little money. As a soldier he was not an official of the Philippines, but of the United State . . ."

In Belcher v. Linn 65 U. S. 526, 16 L.E. 754, 757, the court held as follows:

> "When power or jurisdiction is delegated to any officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are, in general, binding and valid as to the subject matter. The only question which can arise between an individual and the public, or any person, denying their validity are power in the officer and fraud in the party. All other questions

are settled by the decision made or the act done by the tribunal or the officer, whether executive, legislative, judicial, or special, unless an appeal or other revision is provided for by some appellate or supervisory tribunal prescribed by law." (Citing U. S. v. Arredondo, 6 Peters 691, Ranking v. Hoyt 4 Howard 327; Stairs v. Peaslee 18 Howard 524)

In the Arredondo case the court held:

"The validity and legality of an act done by the governor of a conquered province depends on the jurisdiction over the subject matter delegated to him by his instruction from the king and the local laws and usages of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid: if there is a discretion conferred, its abuse is a matter between the governor and his government."

The court will recognize the fact that there are certain presumptions of law which are irrebuttable and cannot be contradicted by evidence. This rule rests on grounds of public policy so compelling in character as to override the generally fundamental requirements of law that questions must be resolved according to proof. The evidence of certain kinds of facts is excluded because its admission would injure some other cause more than it would help in the particular case.

An illustration of this is where a Judge sitting on the trial of an enemy, taking secret personal pleasure in passing sentence upon him, is conclusively presumed to be acting in an official capacity when the sentence is inflicted, and the sentence in cannot be attacked on the grounds that the Judge was acting outside his official capacity, merely because he was gratifying revenge at the same time he was doing his official duty. For the law to allow evidence of such would be most preposterous.

The principle of law as to the acts of a public official is similar to that of Res Judicata.

If a public official is directed by statute to perform a certain act, and does perform that act, and then claims he performed the act as required by law, there arises an irrebuttable

presumption that the act was an official one. Where the government admits that Linder is a State official, that he performed certain acts required of him by statute, and Linder swears he performed these acts in his official capacity, the Government is concluded from attacking these acts as unofficial.

In their brief on page 63, in discussing the charge against Mr. Linder, Counsel for the Government concede that the charge is based on a mere inference:

> " . . . the charge is that he had a personal, financial stake outside of his job in such a way as to permit the inference that he was being paid to divide his loyalties between Georgia, on the one hand, and his personal interests, as well as those of Moore and Harriss, on the other."

Again, on pages 55, 56 and 57, in discussing the unconstitutionality of the act caused by the indefinite meaning of "principal purpose", Counsel for the Government says on page 57:

> "Where contributions have several purposes, the qualifying word 'principal' may possibly raise problems."

Considering these two quotations together, we construe them as an admission that even the Government Counsel believe that not only is there no basis for the prosecution of Mr. Linder, but that as to him the act is unconstitutional.

Wherefore, we pray that the court affirm the dismissal of the Information as to Mr. Linder, whether on the ground of the unconstitutionality of the act or on the ground that the information shows that this defendant acted in his official capacity.

Respectfully submitted,

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